

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11

Date: 5 April 2013

Date of public redacted version: 11 December 2017

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Public redacted version of

**Order to the Prosecution to provide additional details on eight documents
subject to a disclosure request**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for William Samoei Ruto

Counsel for Joshua Arap Sang

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Regulation 28 of the Regulations of the Court, issues this Order to the Prosecution to provide additional details on eight documents subject to a disclosure request.

1. On 25 January 2013, the Office of the Prosecutor (“Prosecution”) filed an application requesting the authorisation to disclose one additional document after the 9 January 2013 disclosure deadline.¹ In this application, the Prosecution submitted that, if the request were to be granted, it would file an updated version of the list of evidence (“LOE”), which would include the additional document. Further, the Prosecution informed the Chamber that it intends (i) to remove several documents from this updated LOE on which it does not intend to rely for purpose of the trial and (ii) to correct some clerical errors.²
2. On 11 February 2013, the defence teams for Mr Ruto and Mr Sang (together the “Defence”) filed a response³ in which they informed the Chamber that they do not object to the disclosure of the additional document. In respect of the Prosecution’s notification of the withdrawal of several documents from the LOE, the Defence noted that 22 of the items designated for removal had not yet been disclosed to the Defence. It requested the Chamber to order the Prosecution to disclose these items to the Defence, even if they are withdrawn (“Request”).⁴

¹ Prosecution’s application for an extension to the deadline set by Decision ICC-01/09-01/11-440 to disclose one additional incriminatory document, ICC-01/09-01/11-570-Conf, with Annex 1 and 2 filed confidential *ex parte* Prosecution and VWU only and Annex 3 filed confidential.

² ICC-01/09-01/11-570-Conf, para. 2.

³ Joint Defence Response to Application for an extension of the deadline set by Decision ICC-01/09-01/11-440 to disclose one additional incriminatory document, ICC-01/09-01/11-595-Conf.

⁴ ICC-01/09-01/11-595-Conf, paras 9, 12.

3. On 21 February 2013, the Chamber issued a decision authorising the disclosure of the additional document.⁵ In respect of the Request, the Chamber considered it to be a new request and ordered the Prosecution to respond to this request by no later than 26 February 2013.⁶
4. Accordingly, on 26 February 2013, the Prosecution filed its response to the Defence's Request ("Response").⁷ Therein, the Prosecution informs the Chamber that ten of the 22 items in question had already been disclosed to the Defence under different ERNs.⁸ With respect to another four items, the Prosecution informed the Chamber that it will disclose them to the Defence.⁹ For the remaining eight documents ("Eight Documents"), the Prosecution informs the Chamber that it does not intend to disclose them to the Defence.¹⁰
5. On 14 March 2013, the Chamber, after noting that it did not have access to six emails covered by the Request, ordered the Prosecution to provide the Chamber with copies of them.¹¹
6. On 15 March 2013, the Prosecution provided the Chamber with the documents requested.¹²
7. The Chamber has now had an opportunity to review the Eight Documents, which consist of six copies of the emails¹³ and two meeting notes.¹⁴ The

⁵ Decision on Prosecution's application to disclose one additional document, ICC-01/09-01/11-614.

⁶ ICC-01/09-01/11-614, para. 10.

⁷ Prosecution's response to joint Defence request for communication of 22 documents under Rule 77, ICC-01/09-01/11-627, with confidential *ex parte*, Prosecution only annex, ICC-01/09-01/11-627-AnxA.

⁸ Response, ICC-01/09-01/11-627, para. 7 and footnote 7.

⁹ Response, ICC-01/09-01/11-627, para. 8.

¹⁰ Response, ICC-01/09-01/11-627, paras 9 and 10.

¹¹ Order to the Prosecution to provide copies of documents it seeks to withhold from the Defence, 14 March 2013, ICC-01/09-01/11-649.

¹² Prosecution's provision of documents pursuant to the Chamber's order (ICC01/09-01/11-649), 15 March 2013, ICC-01/09-01/11-651, with 6 confidential *ex parte*, Prosecution only annexes.

¹³ ICC-01/09-01/11-651-Conf-Exp-Anx1 (KEN-OTP-0027-0251); ICC-01/09-01/11-651-Conf-Exp-Anx2 (KEN-OTP-0027-0253); ICC-01/09-01/11-651-Conf-Exp-Anx3 (KEN-OTP-0027-0257); ICC-01/09-01/11-651-Conf-Exp-Anx4

Chamber also notes the Prosecution's *ex parte* annex which provides a summary explanation as to why the two meeting notes may not be disclosed.¹⁵ In order to be able to make an informed decision on the Request, the Chamber requires additional information from the Prosecution on the following questions:

- i. Why did the Prosecution previously consider these documents to be material? That is to say, why were they on the LOE and what were they intended to be used for?
- ii. Why specifically did the Prosecution withdraw these meeting notes from the LOE? And, how do those reasons alter the original reasons for including the documents in the LOE to begin with?
- iii. Who is/are the provider(s) of this information? And, in what way were they connected to the meetings in question?
- iv. It appears that Mr Sang's counsel is mentioned at the end of the 10 November meeting notes. Are these documents not then relevant to Mr Sang's representation in the case? Is the implication of his counsel in the alleged plot not reason enough to disclose the document to the Defence?
- v. Do the information providers have security concerns beyond their desire to remain anonymous? If so, what are these concerns? Why did the Prosecution not address those concerns?
- vi. How many of the attachments in [REDACTED] emails are on the Prosecution's LOE? If so, how many of them are provided by sources other than [REDACTED] ?
- vii. How exactly might the documents under request impact on-going investigations?
- viii. When did the Prosecution's now on-going investigation begin, relative to when the Prosecution initially indicated these documents on their LOE? In other words, had the Prosecution initially indicated them on its LOE notwithstanding that it may have had an on-going investigation?

(KEN-OTP-0027-0264); ICC-01/09-01/11-651-Conf-Exp-Anx5 (KEN-OTP-0027-0266); ICC-01/09-01/11-651-Conf-Exp-Anx6 (KEN-OTP-0027-0274).

¹⁴ KEN-OTP-0027-0265; KEN-OTP-0027-0267.

¹⁵ Response, ICC-01/09-01/11-627-Conf-Exp-AnxA.

- ix. How long has the on-going investigation been on-going? When will it conclude, so that these disclosures may be made?
- x. If OTP is concerned about witness security, hence a reason to withhold disclosure, does it not follow then that they may never disclose the documents to the defence out of that fear, even for purposes of any proceedings resulting from their on-going investigation?

THE CHAMBER HEREBY

ORDERS the Prosecution to provide the Chamber with its responses to the questions listed in paragraph 7 by 12 April 2013.

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 5 April 2013

At The Hague, The Netherlands